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12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 RICHARD SKAFF,

15 Plaintiff,

16 vs.

17 REAL MEX RESTAURANTS, INC;  
18 GENERAL GROWTH PROPERTIES,  
19 INC. and DOES 1-25, Inclusive,

20 Defendants.

Case No. C09-05518 JSW

**DEFENDANT REAL MEX  
RESTAURANTS, INC.'S ANSWER TO  
COMPLAINT**

**DEMAND FOR JURY TRIAL**  
[FED. R. CIV. P. 38(b)]

Complaint Filed: November 20, 2009  
Trial Date: None Set

21  
22 Defendant Real Mex Restaurants, Inc. ("Defendant") answers the Complaint (the  
23 "Complaint") of plaintiff Richard Skaff ("Plaintiff") as follows:

24 1. In response to paragraph 1 of the Complaint, Defendant is without  
25 knowledge or sufficient information to form a belief as to the truth that Plaintiff  
26 currently is "physically disabled," as defined by all applicable California and United  
27 States laws, and on that basis Defendant denies this allegation.

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1           2.     In response to paragraph 2 of the Complaint, Defendant admits that there is  
2 a Chevy's restaurant ("Restaurant") in the Stonestown Galleria shopping center, which  
3 is located on 20<sup>th</sup> Avenue in San Francisco, California. Defendant is without  
4 knowledge or information sufficient to form a belief as to the truth of the allegation that  
5 Plaintiff visited the subject property or encountered barriers that interfered or denied  
6 full and equal access to the facilities owned and/or operated by Defendant, and on that  
7 basis, denies the remaining allegations in paragraph 2.

8           3.     In response to paragraph 3 of the Complaint, Defendant admits that this  
9 Court currently has jurisdiction pursuant to 28 U.S.C. §§ 1331. Defendant also admits  
10 that Plaintiff may be authorized to make his claims under California Government Code  
11 §4450, *et. seq.*, Health & Safety Code §19955 and §19959, Title 24 California Code of  
12 Regulations; and California Civil Code §§54, 54.1, and 55.

13           4.     In response to paragraph 4 of the Complaint, Defendant admits venue is  
14 proper.

15           5.     In response to paragraph 5 of the Complaint, Defendant admits that this  
16 case should be assigned to San Francisco intradistrict.

17           6.     In response to paragraph 6 of the Complaint, Defendant admits that Real  
18 Mex Restaurants, Inc., operates or leases the Chevy's restaurant. Defendant further  
19 admits that the Restaurant is a public accommodation or facility. Defendant is without  
20 knowledge or information sufficient to form a belief as to the truth of the remaining  
21 allegations, and on that basis, denies the remaining allegations in paragraph 6.

22           7.     In response to paragraph 7 of the Complaint, Defendant is without  
23 knowledge or information sufficient to form a belief as to the truth of the allegations,  
24 and on that basis, denies those allegations.

25           8.     In response to paragraph 8 of the Complaint, Defendant is without  
26 knowledge or information sufficient to form a belief as to the truth of the allegations,  
27 and on that basis, denies those allegations.

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1           9. In response to paragraph 9 of the Complaint, Defendant is without  
2 knowledge or information sufficient to form a belief as to the truth of the allegations,  
3 and on that basis, denies those allegations.

4           10. In response to paragraph 10 of the Complaint, Defendant states that  
5 §19955 of the Health & Safety Code and Title 24 of the California Code of Regulations  
6 speak for themselves. Defendant is without knowledge or information sufficient to  
7 form a belief as to the truth of the remaining allegations, and on that basis, denies the  
8 remaining allegations in paragraph 10.

9           11. In response to paragraph 11 of the Complaint, Defendant is without  
10 knowledge or information sufficient to form a belief as to the truth of the allegations  
11 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
12 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
13 denies these allegations.

14           12. In response to paragraph 12 of the Complaint, Defendant is without  
15 knowledge or information sufficient to form a belief as to the truth of the allegations  
16 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
17 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
18 denies these allegations.

19           13. In response to paragraph 13 of the Complaint, Defendant is without  
20 knowledge or information sufficient to form a belief as to the truth of the allegations  
21 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
22 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
23 denies these allegations.

24           14. In response to paragraph 14 of the Complaint, Defendant is without  
25 knowledge or information sufficient to form a belief as to the truth of the allegations  
26 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
27 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
28 denies these allegations.

1           15. In response to paragraph 15 of the Complaint, Defendant denies each and  
2 every factual allegation contained in paragraph 15.

3           16. In response to paragraph 16 of the Complaint, Defendant denies each and  
4 every factual allegation contained in paragraph 16.

5           17. In response to paragraph 17 of the Complaint, Defendant denies each and  
6 every factual allegation contained in paragraph 17.

7           18. In response to paragraph 18 of the Complaint, Defendant denies each and  
8 every factual allegation contained in paragraph 18.

9           19. In response to paragraph 19 of the Complaint, Defendant is without  
10 knowledge or information sufficient to form a belief as to the truth of the allegations  
11 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
12 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
13 denies these allegations.

14           20. In response to paragraph 20 of the Complaint, Defendant incorporates the  
15 responses contained in paragraphs 1 through 19 of this Answer.

16           21. In response to paragraph 21 of the Complaint, Defendant states that 42  
17 USC §12101 speaks for itself.

18           22. In response to paragraph 22 of the Complaint, Defendant states that 42  
19 USC §12101(b) speaks for itself.

20           23. In response to paragraph 23 of the Complaint, Defendant states that 42  
21 USC §12181ff speaks for itself.

22           24. In response to paragraph 24 of the Complaint, Defendant states that 42  
23 USC §12182 speaks for itself.

24           25. In response to paragraph 25 of the Complaint, Defendant denies each and  
25 every factual allegation contained in paragraph 25.

26           26. In response to paragraph 26 of the Complaint, Defendant is without  
27 knowledge or information sufficient to form a belief as to the truth of the allegation that  
28 Plaintiff visited the Restaurant or encountered barriers that interfered or denied full and

1 equal access to the facilities owned and/or operated by Defendant, and on that basis,  
2 denies this allegation.

3 27. In response to paragraph 27 of the Complaint, Defendant is without  
4 knowledge or information sufficient to form a belief as to the truth of the allegations  
5 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
6 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
7 denies these allegations.

8 28. In response to paragraph 28 of the Complaint, Defendant denies each and  
9 every factual allegation contained in paragraph 28.

10 29. In response to paragraph 29 of the Complaint, Defendant is without  
11 knowledge or information sufficient to form a belief as to the truth of the allegations  
12 that Plaintiff visited the Restaurant or encountered barriers that interfered or denied full  
13 and equal access to the facilities owned and/or operated by Defendant, and on that basis,  
14 denies these allegations.

### 15 16 **FIRST AFFIRMATIVE DEFENSE**

17 As a first affirmative defense, Defendant asserts that California's Title 24 does  
18 not apply to this answering Defendant because the facility was built and/or modified  
19 prior to the date that Title 24 was enacted.

### 20 21 **SECOND AFFIRMATIVE DEFENSE**

22 As a second affirmative defense, Defendant asserts that Plaintiff has acted with  
23 "unclean hands" and such actions are directly related to the claims by Plaintiff in the  
24 Complaint and precludes Plaintiff from pursuing the claims in the Complaint.  
25 Therefore, Plaintiff is barred from seeking relief by the Doctrine of Unclean Hands.

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1                                   **THIRD AFFIRMATIVE DEFENSE**

2           As a third affirmative defense, Defendant asserts that at all times mentioned in  
3 the Complaint, the Plaintiff so carelessly, recklessly and negligently conducted and  
4 maintained himself so as to cause and contribute in some way to the damages, if any,  
5 alleged to have been sustained by Plaintiff. Therefore, Plaintiff's recovery herein as to  
6 any damage and injuries suffered by Plaintiff, if any, shall be diminished to the extent  
7 that such injury or damages were proximately caused by the negligence or intentional  
8 conduct of Plaintiff.

9  
10                                   **FOURTH AFFIRMATIVE DEFENSE**

11           As a fourth and separate affirmative defense to the Complaint filed herein, and to  
12 each alleged cause of action set forth herein, this answering Defendant alleges that the  
13 Complaint fails to state facts sufficient to constitute a cause of action as against  
14 Defendant for the reason that the same appears to be barred by the applicable statute of  
15 limitations.

16  
17                                   **FIFTH AFFIRMATIVE DEFENSE**

18           As a fifth and separate affirmative defense to the Complaint filed herein, and to  
19 each alleged cause of action set forth therein, this answering Defendant alleges that the  
20 Complaint fails to state facts sufficient to constitute a cause of action under any legal  
21 theory.

22  
23                                   **SIXTH AFFIRMATIVE DEFENSE**

24           As a sixth and separate affirmative defense to the Complaint filed herein, and to  
25 each alleged cause of action set forth therein, this answering Defendant alleges that in  
26 the event this answering Defendant is found to be negligent (which supposition is  
27 denied and merely stated for the purpose of this affirmative defense), this answering  
28 Defendant's liability for non-economic damages is to be reduced to reflect its actual

1 percentage of fault, and a separate judgment shall be rendered against the answering  
2 Defendant for that amount.

#### 3 4 **SEVENTH AFFIRMATIVE DEFENSE**

5 As a seventh and separate affirmative defense to the Complaint filed herein, and  
6 to each alleged cause of action set forth therein, this answering Defendant alleges that  
7 the damages, injuries or condition which form the basis for this lawsuit, may be the  
8 result of a natural disease or condition, or may be the expected result of reasonable  
9 treatment, and that the answering Defendant is not liable to plaintiff for such damages,  
10 injuries or condition.

#### 11 12 **EIGHTH AFFIRMATIVE DEFENSE**

13 As an eighth affirmative defense, the answering Defendant believes and based  
14 upon such information and belief alleges that Plaintiff has failed to give any notice to  
15 Defendant, prior to filing suit, that he considered Defendant's premises to be out of  
16 compliance with State and Federal law. Therefore, his Complaint is barred.

#### 17 18 **NINTH AFFIRMATIVE DEFENSE**

19 As a ninth affirmative defense, the Complaint and each cause of action alleged  
20 herein, fails to state facts sufficient to constitute a cause of action for Violations of the  
21 Health and Safety Code, including, but not limited to §§ 19955, 19953, 19959 or  
22 Government Code § 4450.

#### 23 24 **TENTH AFFIRMATIVE DEFENSE**

25 As a tenth affirmative defense, this answering Defendant believes and based upon  
26 such information alleges that Plaintiff is estopped from seeking the relief he requests  
27 due to his own acts and/or omissions with reference to the subject matter of the  
28 Complaint.



**ELEVENTH AFFIRMATIVE DEFENSE**

As an eleventh affirmative defense, this answering Defendant believes and based upon such information and belief alleges that Plaintiff was not deterred from visiting Defendant's Restaurant.

**TWELFTH AFFIRMATIVE DEFENSE**

The Complaint and each cause of action alleged herein, fails to state facts sufficient to constitute a cause of action for Violation of the Americans with Disabilities Act of 1990 (49 USC §12101, et seq.).

**THIRTEENTH AFFIRMATIVE DEFENSE**

The Complaint and each cause of action alleged herein, fails to state facts sufficient to constitute a cause of action for Violation of the California Civil Code, including, but not limited to §§51 and 54.

**FOURTEENTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because to the extent architectural barriers alleged by Plaintiff exist (which supposition is denied and merely stated for the purpose of this additional defense), the modification of such barriers is not readily achievable.

**FIFTEENTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because Defendant offered reasonable accommodations to Plaintiff.

**SIXTEENTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because to the extent architectural barriers alleged by Plaintiff exist (which supposition is denied and merely stated for the purpose of this additional defense), the removal of such barriers is structurally impractical.



1 **SEVENTEENTH AFFIRMATIVE DEFENSE**

2 All of Plaintiff's claims are barred because to the extent architectural barriers  
3 alleged by Plaintiff exist (which supposition is denied and merely stated for the purpose  
4 of this additional defense), the removal of such barriers is technically infeasible.

5  
6 **EIGHTEENTH AFFIRMATIVE DEFENSE**

7 All of Plaintiff's claims are barred because to the extent architectural barriers  
8 alleged by Plaintiff exist (which supposition is denied and merely stated for the purpose  
9 of this additional defense), the removal of such barriers is virtually impossible.

10  
11 **NINETEENTH AFFIRMATIVE DEFENSE**

12 All of Plaintiff's claims are barred because to the extent architectural barriers  
13 alleged by Plaintiff exist (which supposition is denied and merely stated for the purpose  
14 of this additional defense), the removal of such barriers would result in an undue burden  
15 on Defendant.

16  
17 **TWENTIETH AFFIRMATIVE DEFENSE**

18 All of Plaintiff's claims are barred because all architectural barriers alleged by  
19 Plaintiff do not exist and/or fall within "conventional building industry tolerances" or  
20 "dimensional tolerances."

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22 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

23 All of Plaintiff's claims are barred because Defendant provided equivalent  
24 facilitation at the premises.

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**TWENTY-SECOND AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because Defendant's compliance with state and federal disabled access laws would constitute a direct threat to health and safety of others.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because Plaintiff assumed the risk of visiting Defendant's premises.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because any discrimination Plaintiff suffered at Defendant's premises (which supposition is denied and merely stated for the purpose of this additional defense) resulted from isolated or temporary (or both) interruptions in the Restaurant's goods and services.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because Plaintiff failed to request reasonable accommodations or modifications to Defendant's premises.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

All of Plaintiff's claims are barred because they are unconstitutional.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

All of Plaintiff's causes of action are barred because Plaintiff suffered no damages as a result of the alleged conduct.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

All of Plaintiff's causes of action are barred because Plaintiff lacks standing to seek relief for any of his claims.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

Defendant presently has insufficient knowledge or information upon which to form a belief as to whether it may have additional affirmative defenses available. Defendant reserves the right to assert additional affirmative defenses in the event discovery or further analysis indicates that additional, unknown or unstated affirmative defenses would be applicable.

WHEREFORE, this answering Defendant prays judgment as follows:

1. That Plaintiff take nothing by way of this Complaint;
2. That Judgment be rendered in favor of Defendant Real Mex Restaurants, Inc. against Plaintiff and that the Complaint be dismissed with prejudice;
3. That Defendant be awarded its costs of suit incurred in the defense of this action;
4. That Defendant be awarded its attorneys' fees of suit incurred in the defense of this action; and
5. For such other relief as the Court deems proper.

Dated: December 22, 2009

CALL, JENSEN & FERRELL  
A Professional Corporation  
Scott J. Ferrell  
Scott R. Hatch

By: /s/ Scott R. Hatch  
SCOTT R. HATCH

Attorneys for Defendant Real Mex Restaurants,  
Inc.

**DEMAND FOR JURY**

Defendant Real Mex Restaurants, Inc. hereby demands a jury pursuant to FRCP 38(b) on all issues raised in the Complaint of Plaintiff Richard Skaff.

Dated: December 22, 2009

CALL, JENSEN & FERRELL  
A Professional Corporation  
Scott J. Ferrell  
Scott R. Hatch

By: /s/ Scott R. Hatch  
SCOTT R. HATCH

Attorneys for Defendant Real Mex Restaurants,  
Inc.